No. 89-1680

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMERICAN COUNCIL ON EDUCATION, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICUS CURIAE[1]

The American Council on Education, which was founded in 1918, is one of the nation's leading higher education organizations. Its members include more than 1500 colleges and unversities, both public and private, as well as

[1] This brief is submitted with the consent of the parties pursuant to Supreme Court Rule 37. Letters of consent are on file with the Clerk.

other higher education groups. The Council aims to promote and preserve the goals of higher education, including the interests of its constituent institutions, their students, faculty and administrators. The Council participates in only a few cases each year which, like this one, raise significant issues of importance to institutions of higher education in the United States.

The Council's concerns in this case arise principally from the judicial award of tenure to remedy a finding of sex discrimination. At issue is how best to balance the national goal of eliminating employment discrimination with the constitutionally-protected interest of our nation's colleges and universities in the preservation of their freedom from control by the state. The resolution of this issue is of great importance to the Council and its members, all of whom are committed not only to equal employment opportunity but also to the preservation of the system of self-governance which is essential to the mission of institutions of higher education.

For these reasons, a definitive resolution of the issues presented by the petition for certiorari will necessarily benefit the Council and its member colleges and universities. Accordingly, the Council supports the petition and respectfully submits its views on the issues presented.

REASONS FOR GRANTING THE PETITION

I.

The Council does not assert that personnel decisions made by colleges and universities are in any sense exempt from measurement against the goals and requirements of Title VII. It does assert, however, that because of the striking singularity of academic tenure, as well as the First Amendment protection accorded a university to determine on academic grounds "who may teach," the Court should consider and decide the principal issue raised by the certiorari petition: Whether, in the con-

text of a finding of liability under Title VII, a remedy of academic tenure may be judicially imposed in the face of a genuine and serious dispute about the academic qualifications of a tenure candidate.

A. A university's decision to confer academic tenure stands dramatically apart from employment decisions in other contexts. *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2d Cir. 1984). ("[T]enure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally."). The award of tenure follows a lengthy probationary period—seven years long at most universities. *See 1940 Statement of Principles and Interpretive Comments*, American Association of University Professors, "Policy Documents and Reports," 1984 ed., p. 4. In addition, tenure reflects what is essentially a lifetime commitment on the part of the university to the individual. It is based on factors that are both subjective and quite extensive. "The particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well known scholars and up-and-coming faculty all must be taken into account. The individual's capacities are obviously critical. His or her teaching skills, intelligence, imagination, willingness to work, goals as a scholar and scholarly writing must be evaluated . . . ." *Zahorik, supra*, at 92.

Further, a university's "business" is academic excellence; and its very essence depends upon the quality of its faculty—especially its tenured faculty. Moreover, a faculty member's contribution to that excellence is not confined to his or her own academic achievements, because the tenured faculty of a university may exercise significant control over the direction and management of the institution. See *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980). Thus, when tenure decisions are made, these latter factors must also be carefully weighed by a university president and its trustees—the persons charged

with the ultimate responsibility for a university's continuance as a viable educational entity and as a contributor to the betterment of the society in which it exists.

In sum, the complexities of a university's tenure decision are such that there will inevitably be a multiplicity of factors involved; for the process of tenuring at a university involves many layers of decision-making, all rendering subjective judgments of a candidate's past performance and future promise. The success of a worthy candidate is by no means assured, and when the decision is finally made, it will necessarily reflect a range of considerations.[2]

B. The record in this case establishes that the respondent's candidacy for tenure was uncertain and fraught with doubts unconnected with discriminatory motive.[3]

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[2] The testimony in this case of Boston University's president, Dr. John Silber, provides insight into the workings of the tenure process at a large, "mature" university. Dr. Silber testified that the ability to offer tenured contracts enables a university to recruit faculty members of oustanding quality and thus to compete successfully with other institutions for the enrollment of students. When he became its president in 1971, Dr. Silber found that Boston University was "in the red" intellectually. Accordingly, he insisted that the tenure standards of the past be raised year by year, so that Boston University finally reached "a point at which tenure standards were as demanding here as they are anywhere." Dr. Silber also noted that an award of tenure typically binds Boston University for a period of 40 years and involves a commitment of about $2,000,000 (C.A. App. 453-57, 475-76).

The determination of whether tenure should be granted, Dr. Silber testified, is "a very complex decision" that takes multiple factors into account, including a university's financial stability and its other needs. Accordingly, "[t]here is a presumption that tenure should not be awarded to any candidate;" and it is granted only when "there is overwhelming reason for doing so" (C.A. App. 462-64)).

[3] The Council does not mean to express any view as to the merits of the respondent's tenure candidacy; the point is that the record reflects that the case for mandated tenure for the respondent is, at best, mixed and ambiguous.

Indeed, the district court stated that there was "some dispute as to the quality of [the respondent's] scholarship." Cert. Pet. 68a. For example, although the respondent was unanimously recommended for tenure by the members of her department and by the College Appointments, Promotions, and Tenure ("APT") Committee, the vote of the University APT Committee, although supportive, was not unanimous. The latter Committee, as well as the College Dean, the University's Assistant Provost, and the University's Provost had some doubts about the respondent's scholarship. Further, an *ad hoc* Tenure Review Committee ("TRC"), composed of three impartial professors from outside Boston University, recommended that the respondent be tenured with one member dissenting and with all members expressing "reservations" about Brown's qualifications for tenure. See Cert. Pet. 3-7, 4a-9a.[4]

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[4] Again, Dr. Silber's testimony in this case is illustrative of the working of the tenure process at "mature" universities and the manner in which university presidents treat a tenure candidacy. Dr. Silber, who twice reviewed the respondent's tenure file, explained at trial how he reaches a decision concerning the grant of tenure, and why the "negatives" concerning the respondent influenced his decision to deny her tenure. To reach a tenure decision, Dr. Silber "feels personally obligated to review with care recommendations made by anyone who is asked for an opinion and to evaluate their assessments." In weighing the quality of a recommendation, Dr. Silber looks to the facts supporting it, to the background and competence of the person making it, and to the relationship of the person to the candidate. Accordingly, in order to achieve "as much objectivity as is possible," Dr. Silber does "not rely exhaustively or even primarily on the opinion of [a candidate's] immediate colleagues [because] a system of friendship or antipathy nearly always develops within a department," and thus the department may be "predisposed" for or against a candidate "without good justification" (C.A. App. 459-461).

When Dr. Silber reviewed the respondent's tenure candidacy the first time, he paid "a great deal of attention" to the reviews of her Austen book, especially the N.Y. Times review by Tony Tanner, whose criticism, Silber thought, "was very substantial," and to Pro-

Accordingly, it is clear that this is not a case where tenure has been denied on the basis of a record showing that the plaintiff's qualifications for tenure were undisputed. *Cf. Ford v. Nicks*, 741 F.2d 858, 864 (6th Cir. 1984); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980). Where there is such a dispute—and thus where there is clearly some basis for denying tenure on academic grounds irrespective of alleged sex discrimination—judicial awards of tenure intrude quite significantly on academic freedom and the parameters for such awards should be addressed by this Court.

C. Because of the vital role of education in our society and the nation's commitment to freedom of speech and academic freedom, the Court has noted that academic institutions possess certain "essential freedoms" under the First Amendment, including the freedom to determine for themselves, on academic grounds, who may teach at the institutions. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1985) (Stevens, J., concurring). Further, the Court has narrowed the power of the judiciary to overrule university decisions made on academic grounds:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show

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fessor Tave's evaluation, which was "a very negative assessment" (C.A. App. 460, 470-72). He therefore regarded the three-year extension recommendations of the Dean and Provost as "ideal," because such an extension "would give a young, promising scholar an opportunity to demonstrate that level of maturity that had not yet been shown, and [he] was very hopeful that within another three years this candidate would clearly justify tenure" (C.A. App. 465-66, 473-76). After his second review, Dr. Silber concluded that the TRC evaluations confirmed his earlier view that the respondent should not be tenured at that time (C.A. App. 477-91).

> great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (where the Court rejected a substantive due process challenge to a state university's decision to dismiss a student).

Despite such pronouncements, the Court has not ruled squarely on the issue of whether a university's interest in determining who should be awarded tenure—i.e., "who may teach" at the university—may be undermined judicially even though there exists a genuine dispute as to the academic qualifications of a tenure candidate. Moreover, in the recent *University of Pennsylvania v. E.E.O.C.* case, —— U.S. ——, 107 L.Ed.2d 571 (1990), the Court recognized this issue, but expressly left it for a future decision: "We need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty. . . ." 107 L.Ed.2d at 587. Additionally, the Court also there repeated the cautionary statement in the earlier *Regents of University of Michigan v. Ewing* case, *supra*, that judges " 'should show great respect for the faculty's professional judgment,' " adding that "[n]othing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Id* at 588 (emphasis in original).

In this posture of the law, this Court's resolution of the "judicial tenuring of professors" issue appears highly desirable. As we have stated in describing the Council's "Interest" in this case, the immediate resolution of this academic freedom issue would serve the interests of both the Council and its members.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: May, 1990